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SENTENCING: WHERE CASE THEORY AND THE CLIENT MEET

KIMBERLY A. THOMAS*

Criminal sentencing hearings provide unique opportunities for teaching and learning case theory. These hearings allow attorneys to develop a case theory in a context that both permits understanding of the concept and, at the same time, provides a window into the difficulties case theory can pose. Some features of sentencing hearings, such as relaxed rules of evidence and stock sentencing stories, provide a manageable application of case theory practice. Other features of sentencing hearings, such as the defendant's allocution, require an attorney to contend with competing "case theories," and as a result, to face the ethical and counseling challenge of developing a case theory together with her client. Specifically, this client-centered approach to sentencing case theory brings to the surface any conflicts between attorney and client about what is the "best" result or strategy. Sentencing presents a rich, yet comprehensible, application for the learning of case theory.

INTRODUCTION

Case theory risks being an afterthought of clinical teaching and practice – necessary and critically important, but sandwiched in between the “real” work of trial advocacy, substantive skills, and ethics. Case theory is best taught in an applied way that permits a relatively easy understanding of the concept of case theory and yet provides a context in which the nuances and difficulties of case theory can be explored. For a number of reasons, sentencing, too often an afterthought of criminal practice, can provide this space for teaching case theory.

Picture a criminal sentencing hearing conducted by a competent defense attorney, who has held the government to its proofs at trial, has investigated her client's background, and prepared mitigating evidence to present on her client's behalf at the hearing. A dream of defense sentencing practice in an overburdened system? Perhaps. Yet, both case theory and the client are missing. An example helps to explain.

Lawyer: . . . In sum, my client is very sorry for what happened.

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Further, my client's mental illness, as shown by the records submitted to the court, provide another reason to give a sentence at the low-end of the guidelines range.

Judge: Sir, do you have anything to say on your own behalf?

Defendant: Yeah. I disagree with the verdict completely. I don't know what my lawyer is talking about. I'm getting railroaded here for something I didn't do.

This fictional but familiar script highlights the importance of presenting a coherent case theory at sentencing, the necessity of incorporating into this theory an awareness of the client's goals and views, and the disjoint that results when this essential process does not occur.

This essay examines the rich potential of criminal sentencing hearings for teaching broad and deep lessons about case theory. Because sentencing is a point in a case at which the attorney's case theory almost inevitably meets, and has the potential to collide with, the client's own case theory, the learning opportunities are great. The challenges of this lawyering moment present pedagogical opportunities. In Part I, I define what I mean by case theory with a particular focus on the difficulty of developing a case theory that reflects, or at least incorporates, the client's understanding of the case. I briefly review the literature on teaching case theory in a clinical setting. In Part II, I argue that the features of a criminal sentencing hearing make it a uniquely good vehicle for grappling with the difficulties of case theory. Specifically, because the client gets the opportunity to present what he perceives to be relevant about himself and the case, both during the presentence interview and in court during allocution, there are important strategic decisions that should be made together with the client, potential ethical pitfalls, and endless counseling opportunities in hashing out the case theory for sentencing. While there is widespread agreement that an attorney should develop a theory of the case with the client's input or, at a minimum, assent, the potential for confrontation between the client's theory and the attorney's theory can be complicated.

I. CASE THEORY AND CLIENTS

A. *What is Case Theory?*

Lawyers and law professors universally agree that case theory is important.¹ Yet, what they mean by "case theory" or the context in

¹ See, e.g., PETER MURRAY, BASIC TRIAL ADVOCACY 53 (1995) (stating that the "fact 'theory of the case' . . . is at the core of effective trial advocacy."); Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 17-18 (1993).

which it applies is not always clear.² A definitive definition of case theory is elusive. Some focus on the elemental role of case theory in giving coherence to disparate facts of the case in a way that resonates with the basic intuitions of the fact-finder. For example, Peter Murray defines “fact theory of the case” as “the fact picture to be presented and the references to logic, consistency, and above all, human experience, that support acceptance of that fact picture by the factfinders.”³ Under this understanding, case theory should also adhere to the legal architecture of the proceeding.⁴ Others take a broader view. Binny Miller describes it as “an explanatory statement linking the ‘case’ to the client’s experience of the world.”⁵ In defining case theory in such a way, Miller explicitly inserts the client’s perspective into the basic meaning of case theory. Therefore, a comprehensive definition of case theory includes four elements: the facts presented, the legal framework, the client’s perspective, and coherence with the audience’s moral intuitions or lived experiences.⁶

In many descriptions, especially in trial advocacy materials, case

² Our occasional failure to be clear and descriptive, especially in matters that require creativity and strategic choices, has rightly been criticized. See, e.g., Richard K. Neumann, *On Strategy*, 59 FORDHAM L. REV. 299, 319–20 (1990) (“Although a fair amount of the scholarship produced by law school clinicians in recent years has been devoted to demystifying professional thinking, the clinical literature and student reading material still treat strategy as unexplainable and indescribable instinct and intuition. . . . The result is a near absence of scholarship and pedagogy on the *process* of designing overall plans to control events (which many law school teachers dismiss as too instinctual to be taught or learned).”).

³ MURRAY, *supra* note 1, at 53.

⁴ See, e.g., STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 7–8 (3d ed. 2004) (stating that the case theory must incorporate the necessary legal elements of the case).

⁵ Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 487 (1994) [hereinafter Miller, *Give Them Back Their Lives*]. Miller says that this statement “serves as a lens for shaping reality, in light of the law, to explain the facts, relationships, and circumstances of the client and other parties in the way that can best achieve the client’s goals.” See *id.*; see also Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 295 & n.8 (2002) [hereinafter Miller, *Teaching Case Theory*] (using this definition as a basis for discussing the teaching of case theory).

⁶ A variant on case theory is client theory. David F. Chavkin, in particular, uses the term “theory of the client” instead of case theory to emphasize the many non-litigation aspects of case theory. David F. Chavkin, *Spinning Straw Into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 251 n. 28 (2003) [hereinafter Chavkin, *Spinning Straw Into Gold*]. Chavkin describes theory of the client as “the sum of the legal and non-legal strategies that can be created to achieve the goals of the unique client you represent.” *Id.* at 251 (quoting GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978)). Chavkin notes that many others that use the term “case theory” mean for the terminology to have this broader implication. *Id.* at 251, n.28. For simplicity and because I am exploring the practice in a specific context, which eliminates the ambiguity about the applications involved, I explicitly use case theory in the rest of this essay.

theory is viewed primarily as the view of the case that will be presented to the jury at trial.⁷ For example, Edward D. Ohlbaum describes case theory as “the underpinning of a lawyer’s comprehensive and logical explanation to the jury of why the client is in court and entitled to a verdict.”⁸

Others recognize that case theory can be understood as broader than the story told to the judge or jury. For example, theory of the case can be discussed in the context of arbitration proceedings⁹ or on appeal.¹⁰ While some recognize these different applications, they focus their discussions of case theory on these contexts in which case theory is most familiar.¹¹

Many clinical scholars emphasize the importance of case theory in a number of contexts and settings, and the potential to develop different case theories for these different audiences.¹² For example, Ann Shalleck notes that what is commonly called case theory encapsulates the telling of multiple stories in a variety of areas of client representation.¹³ In other words, case theory is fluid and contextual.¹⁴ It is to be

⁷ See, e.g., Anthony J. Bocchino & Samuel H. Solomon, *What Juries Want to Hear: Methods for Developing Persuasive Case Theory*, 67 TENN. L. REV. 543, 543 (2000); Ohlbaum, *supra* note 1, at 17.

⁸ Ohlbaum, *supra* note 1, at 17 (“[Case theory] is comprised of principles of proof and persuasion. It is a design for getting into evidence facts-exhibits, statements, admissions, opinions-upon which the theory is predicated and refuting or keeping out of evidence those facts that are inconsistent with the theory. Ultimately, the case theory is a conceptual path to a practical destination.”).

⁹ Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 49–50 (2006).

¹⁰ Cf. John Pray & Byron Lichstein, *The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School’s Remington Center*, 75 MISS. L. J. 795, 798 n.6 (2006) (noting that the a law school criminal appellate clinic class addresses “Theory of the Case and Postconviction Motions”).

¹¹ See, e.g., Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigms of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767, 768–69 (2006) (discussing strategies for case theory in the context of presentations to a judge or panel of judges).

¹² See, e.g., Miller, *Teaching Case Theory*, *supra* note 5, at 306–07 (encouraging us not to “ignore the reality that different settings call for different stories, both legally and as a matter of good advocacy. This deceptively simple point is surprisingly difficult to explain in class. Often, case theory becomes a kind of synonym for trial theory, and other storylines are reduced to mere argument. There are motions arguments and negotiation arguments in civil and criminal cases, and sentencing arguments in criminal cases. Case theories are reserved for arguments on the merits, whether in trials or administrative settings. This conveys the false message that the ‘real’ case theory is the one for trial, when that may be the least important setting for advocacy.”).

¹³ Ann Shalleck, *Pedagogical Subversion in Clinical Teaching: The Women and the Law Clinic and the Intellectual Property Clinic as Legal Archaeology*, 13 TEX. J. WOMEN & L. 113, 125–126 (2003).

¹⁴ See Miller, *Teaching Case Theory*, *supra* note 5, at 306–07 (“So we need a new, more precise vocabulary for case theory that captures the connection between storytelling and advocacy. We should continue to use the term ‘case theory’ as a general term encompassing the whole range of possible advocacy settings for storytelling, but when the storylines in

understood as relevant not only to the trial, but during the negotiations, pretrial, and even transactional work.¹⁵ Further, a legal situation may present more than one “theory of the case.” Plea or settlement negotiations may involve a case theory with themes of culpability and remorse, while a later motions hearing may develop a theme of overzealous use of police authority, and a later trial may focus on a different case theory that aims to diminish the defendant’s culpability. Careful attorneys will develop each theory with an eye to the others that will be presented over the life of the case to avoid contradictions that undermine the credibility of the case theory.¹⁶ Nonetheless, within this limitation, the attorney and her client may believe that each stage of the proceeding has a different goal and that a specific, and sometimes different, case theory should be developed to achieve each goal.¹⁷

B. *Whose Case Theory Is It Anyway?*

Start then from Miller’s view of case theory. It is a concise view of the relevant piece of the case that integrates the facts present, the legal framework, the client’s perspective, and the audience’s moral intuitions or lived experiences. Synthesizing all of these is not always easy. In fact, difficulty commonly emerges in at least three ways: developing a theory that reflects the client, incorporating the client into the process of developing a case theory, and presenting the theory in a manner or using words that resonate with both the fact-finder and the client. In each of these, the lawyer must determine her proper role and the proper role for her client. In doing so, she must consider the extent to which the case theory is a means for advancing her client’s autonomy and voice within the system and the extent to which it is a means for achieving the best outcome under the circumstances of the case. Finally, if those conflict, she must decide which is more

these settings differ, specify the particular setting in naming the theory (motions case theory, trial case theory, and so on).”).

¹⁵ See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 201 n.3 (1990).

¹⁶ See Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647, 1659 (2004) (“[S]uffice it to say the theory of the case must dovetail, or at least not fight with, the theory of mitigation. One cannot say first that the prosecution has the wrong man, then turn around in the sentencing phase and say this ‘wrong man’ is sorry for what he has done.”).

¹⁷ See, e.g., Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1136 (2003) (stating that “it cannot be assumed that a capital defendant would have the same interest in contesting a particular factual issue at both the guilt and sentencing stages. Indeed, capital defense counsel often use significantly different strategies-and theories of the case-at the guilt and capital sentencing stages.”).

important.¹⁸

1. Case Theory That Reflects The Client

One approach to case theory is for the attorney to collect information from all of the relevant parties, including her own client, and to develop the theory that, based on this information, gives the client the best chance of winning the case. While it is impossible to know whether most lawyers practice in this way, many certainly do. This approach allows the attorney freedom to develop the theory that she believes will get the best result. The approach can be supported by the ethical rules, which allow lawyers to make strategic decisions about a case.¹⁹

Many scholars and clinicians have advocated a different, more client-centered approach to developing case theory.²⁰ First, the lawyer works to recognize and understand the client's perspective and story. The client's theory may be quite different from how the lawyer perceives the case.²¹ Next, the lawyer counsels and negotiates with the client over how the case should be presented to the relevant fact-

¹⁸ This statement assumes, without explicitly defending the position, that, at least in a poverty law practice, such as most of criminal defense work, the client's autonomy and a "good result" for the client are both worthwhile goals. The significance of each of these occupies its own body of literature. For an example of a scholar discussing the importance of advancing client autonomy through a poverty law practice, see Stephan Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 759 (1987) ("Let me begin with the proposition that lawyers should seek to foster the autonomy of their clients within the law."). Ellmann goes on to highlight three significant aspects of client autonomy. *Id.* at 759-61; see also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976). The importance of obtaining a good outcome for one's client almost goes without saying; of course, the harder question is determining how to define a "good result." See, e.g., Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 546 (1990) [hereinafter Dinerstein, *Client-Centered Counseling*] (noting an "absence of agreed-upon measures of successful case resolution"). This statement also does not address the complex situations when it appears to the attorney that these two goals are in competition with each other. See, e.g., William Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991) (noting that the client's autonomous decision and the lawyer's belief in the best interest of the client do not always overlap and the difficulty of differentiating).

¹⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2007) ("... a lawyer shall abide by a client's decisions concerning the objectives of representation and, ... shall consult with the client as to the means by which they are to be pursued. . . ."). But see, e.g., Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CINN. L. REV. 763 (2000) (discussing this decision and developing guidelines to help attorneys think through the division of responsibility).

²⁰ DAVID CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 39-50 (2002).

²¹ Cf. Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2467 (1989) (contrasting the client's theory of the case with the lawyer's theory).

finder.²² This dialogue may result in a theory that integrates both the client and attorney's view of the case. The lawyer could also choose to adopt the client's theory wholesale.²³ In either case, the case theory that is presented will reflect the client's statement of how he understands the case, not just the attorney's independently-developed case theory.²⁴

2. *Developing Case Theory With The Client*

Arguably, the process of creating a case theory can be more important for the preservation of client autonomy and dignity than the actual expression of the theory. For example, a client's version of his case may differ significantly from a case theory that his attorney believes is consistent with the facts and will be effective at trial.²⁵ The client may, after discussion with his lawyer, see the legal process as artifice and, even if he pursues his case theory, not expressive of him. He may believe that the fact-finder is not equipped to understand his perspective. He might choose to adopt a case theory that fits with the audience's view of his case, instead of his perceptions, in part because he recognizes that it may maximize his chance of success.²⁶ The resulting presentation of the client's case might look the same as it would had the attorney developed the case theory without any input

²² Miller, *Give Them Back Their Lives*, *supra* note 5.

²³ Robert Dinerstein, *A Mediation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 973-77 (1992) (discussing case in which clinic client told her story, despite the fact that it did not provide a defense to her case). *See also generally*, Uphoff, *supra* note 19 (generally, deferring to the client's informed decisions, noting that, in practice, it is very difficult to allow clients to make what the attorney sees as a "foolish" decision, and laying out a framework to help determine when to defer to the client).

²⁴ Katherine R. Kruse, *Fortress in the Sand: The Plural Views of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 419 (2006). For more information on the aims and practice of client-centered counseling, see DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE, & PAUL R. TREMBLAY, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1991); Dinerstein, *Client-Centered Counseling*, *supra* note 18, at 507 ("[Client-centered counseling's] goal is not only to provide opportunities for clients to make decisions themselves but also to enhance the likelihood that the decisions are truly the client's and not the lawyer's."); Kruse, *supra*, at 374 ("goals of client-centered representation [include] collaborative decision-making, holistic problem-solving and client empowerment").

²⁵ *See* Leigh Goodmark & Catherine F. Klein, *Deconstructing Teresa O'Brien: A Role Play for Domestic Violence Clinics*, 23 ST. LOUIS U. PUB. L. REV. 253, 269 (2004) (articulating the case theory "forces students to think about how the case theory they craft may or may not correspond with their client's objectives or preferences. The student may want to present the client as the powerless (and therefore sympathetic) victim of domestic violence, while the client wants to focus on her strengths and her resilience."). Two frequently cited articles examining the tension between the client's case theory and the attorney's are Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990), and Cunningham, *supra* note 21, at 2467.

²⁶ White, *supra* note 25, at 30.

from the client. The client may feel ownership over the decision, however, because it rested ultimately with him, and may therefore be more satisfied with the outcome as a result.²⁷

Similarly, a client might choose, despite his attorney's assessment of the risk, to present his own case theory. The lawyer does her client no favors by supporting her client's autonomous decision-making but not discussing the difficulties that inhere in the case theory the client wishes to pursue and the harms that may result from its presentation.²⁸ Good lawyers differ about how much emphasis the attorney's professional opinion or concern for the client's well-being should receive, especially when contrasted with the client's desire to present herself in a self-defining way, but none argue that the counseling should not occur.²⁹

3. *Presenting The Case Theory So That The Client Recognizes Himself*

The manner in which the case theory is presented and the words used to convey the case theory to the fact-finder are another difficulty. A self-reflective, client-centered lawyer might involve her client in the case theory process and help the client develop a theory of the case that reflects the client, yet the attorney may present the case theory to the court in a way that is unrecognizable to the client.³⁰ In "translating" the client's story into legal language the attorney may, in the process, sacrifice the client's understanding of and identification with the story.³¹ The lawyer and the law fail the client if the client cannot appreciate his own story being told.³² The attorney must incorporate the relevant legal rules into the client's understanding and then "translate" the client's narrative back into ordinary language that has meaning for both the audience and for the client.³³

²⁷ Dinerstein, *Client-Centered Counseling*, *supra* note 18, at 547 ("Clients who actually make decisions in their cases may feel better about those decisions precisely because they made them.").

²⁸ See Uphoff, *supra* note 19, at 800-04, 817-18.

²⁹ See *id.* at 834 (discussing these trade-offs).

³⁰ Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 *How. L. J.* 1, 42 n.171 (1996) ("Her voice was not her own. . . . [H]er able attorney filtered his client's theory through a 'governing narrative,' thus recasting her allegations into a 'metalanguage' and 'object language' to which the courts would listen.").

³¹ James Boyd White, *Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life*, 52 *U. CHI. L. REV.* 684, 697 (1985).

³² *Id.*

³³ *Id.* at 692 ("This story will in the first instance be told in the language of its actors. That is where the law begins; in a sense that is also where it ends, for its object is to provide an ending to that story that will work in the world. And since the story both begins and ends in ordinary language and experience, the heart of the law is the process of translation by which it must work, from ordinary language to legal language and back again.").

C. Teaching Case Theory

If case theory is difficult to define precisely and more difficult still to implement, it is a wonder that we attempt to teach it. Many clinical teachers are doing just that, albeit with challenges. First, it can be difficult to avoid teaching case theory as an “add-on,” something that is taught only in one class and later forgotten.³⁴ This is common when trying to cram substantive law, client and trial advocacy skills, and ethical and social justice issues into a single course. Important concepts, like case theory, get mentioned but are given short-shrift or are left for students to grapple with on their own. Many trial advocacy and clinical teaching texts address case theory in isolation, so we as teachers do the same.³⁵ As difficult as it is to teach, it is similarly difficult for law students to learn. The skill of developing case theory does not come easily to most law students, who have been immersed in appellate casebooks with predetermined and rarely-challenged fact patterns³⁶ and who have infrequently been presented with conflicting factual accounts of a case prior to their clinical or externship experience.

Teaching case theory to new lawyers involves helping them develop an understanding of what case theory is, helping them identify and develop possible case theories, and giving them the tools to choose among possible case theories for a given situation, based on their client’s goals and values and the legal and factual constraints of the situation. This is generally all new to law students.

Binny Miller suggests that students be exposed to case theory throughout a clinical course and that students’ exposure begin with a relatively static and simplified version of case theory, as can be seen in fiction, movies, or videos.³⁷ Miller then, over the course of the semester, uses increasing complex examples from fiction, non-fiction, simu-

³⁴ See, e.g., Miller, *Teaching Case Theory*, *supra* note 5, at 307–08 (stating that her teaching has incorporated case theory throughout the semester).

³⁵ See, e.g., MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS AND STRATEGY (2D. ED. 2008) (devoting chapter three to case theory and theme development).

³⁶ See, e.g., Mark Neal Aaronson, *Thinking Like a Fox: Four Domains of Overlapping Good Lawyering*, 9 CLINICAL L. REV. 1, 19–21 (2002) (noting the incompatibility of traditional modes of legal analysis, such as “IRAC,” with developing wide-ranging problem-solving skills). Some students, of course, will be more adept than others at developing case theory. For example, student lawyers, like all other lawyers, will have different levels of “narrative intelligence,” or the “propensity to interpret and construct stories so as to make sense of events, circumstances, and situations.” Angela Olivia Burton, *Cultivating Ethically, Socially, Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligence Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15, 34–35 (2004).

³⁷ Miller, *Teaching Case Theory*, *supra* note 5.

lation, and live-client cases.³⁸ Miller uses each of these to develop a more layered understanding of case theory that, in the end, allows students to imagine, construct, and choose among competing case theories with attention to the changing legal and ethical considerations throughout the life of a case.³⁹ Others focus primarily on the live-client cases, especially trials, to tease out students' ability to see a multiplicity of possible case theories⁴⁰ and to discuss the constraints⁴¹ and considerations lawyers inevitably face when building and choosing among case theories.

It is challenging to convey the complexity of the relationship between the student-attorney and the client⁴² in developing case theory in a way that pays sufficient attention to context but also allows students to understand case theory in a way that promotes the application of their experiences to future cases.

II. SENTENCING HEARINGS & CASE THEORY

Criminal sentencing hearings are a particularly good vehicle for grappling with the difficulties of case theory. Their unique features make them a prime tool for thinking and teaching about case theory. And there are practical reasons why sentencing hearings are an especially effective and accessible tool for teaching case theory.

This essay discusses sentencing hearings in the context of state court practice, the vast majority of settings for clinical criminal defense.⁴³ Whether after a plea or a trial, a sentencing hearing is typi-

³⁸ Miller, *id.* at 308.

³⁹ *Id.* at 308 (discussing a three-stage process of imagining, evaluating, and choosing case theory). See also Miller, *Give Them Back Their Lives*, *supra* note 5, at n.14 (citing articles which discuss "the pedagogical role of case theory" in law school clinics).

⁴⁰ See, e.g., Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41 (1994) (presenting multiple versions of a criminal clinic case).

⁴¹ Frequently addressed constraints include the legal elements or case law, the results of factual investigation in the case, the client herself, and any other moral or ethical constraints. See, e.g., Ohlbaum, *supra* note 1, at 23 ("The advocate must recognize and respect the law of professional responsibility, ethical considerations, and rules of professional conduct in the development and presentation of the case theory."); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 139 (1994) [hereinafter Shalleck, *Clinical Contexts*] ("A lawyer can draw upon a client's experience to shape and push the law, just as the law can exert pressure on the framing of a client's story.").

⁴² See, e.g., H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719 (2000) (arguing that the decision over the theory of the defense should rest with the defendant).

⁴³ Of course, a number of criminal clinics practice in the federal courts as well, including, for example, the New York University Law School's Federal Defender Clinic (information available at <http://www.law.nyu.edu/clinics/year/feddefend/index.html>). In a post-Booker world, these clinics will continue to do sentencing advocacy, which may have an

cally scheduled for a later date. In the interim, the defendant is required, in most cases, to be interviewed by a probation agent, who may also do additional investigation of the defendant and the case, and issue a report and recommended sentence to the judge. This report will also calculate sentencing guidelines, if these are relevant. At the hearing, the judge will typically allow defense counsel to speak first, followed by the prosecutor, and then the defendant himself.

These hearings present unique pedagogical opportunities, as well as unique challenges. The client will hear the attorney's case theory when it is presented. In addition, and more significantly, the client's version of events and account of himself – his "case theory" – will almost inevitably be heard independently of the lawyer's presentation. The sentencing hearing will also commonly include other voices, such as that of the victim, which may directly challenge the client's case theory. More generally, the ethical issues inherent in sentencing dovetail with some of the difficulties and challenges of case theory. Finally, focusing on a "non trial" case theory, such as sentencing, helps demonstrate the pervasiveness of case theory and the need to develop case theory in the context of different stages of a case.

A. Client Communication And Counseling About Case Theory

The defendant will hear what is said about him by his attorney at sentencing, a public hearing at which the defendant is entitled to be present.⁴⁴ When compared with a conceptualization of case theory that focuses on the trial, this observation is unremarkable. Clients also hear the presentation of the case theory and what is said about the client and his or her actions during the trial, in opening and closing statements and the questions that are posed to witnesses. When we step back and consider the stages of a case (criminal or civil), however, and the number of opportunities that a lawyer has to present a story of the client and her case, the fact of the client's presence becomes notable. In criminal cases, for example, much of the discussion of a client and the facts of the case – and, therefore, the explication of the case theory – occur in the context of plea bargain negotiations. Plea bargaining, like pretrial negotiations in civil practice, occurs out of the client's earshot. The attorney chooses what theory of the case to present at these negotiations, but is never forced to confront the client's hearing of, and reaction to, this account.

increased effect on the sentences received by their clients.

⁴⁴ *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *Warrick v. United States*, 551 A.2d 1332, 1334 (D.C. 1982) (constitutional right to be present at sentencing).

The defendant's account of himself and his conduct will be heard during the sentencing process, independent of the attorney's representation, often for the first time. During much of the pretrial process, lawyers are negotiating with opposing counsel or developing and litigating pretrial motions. During negotiations, the defendant is neither heard from nor physically present. Pretrial motions, such as motions to suppress, may involve the defendant's testimony and input, but are often based more on an attorney's assessment of whether there has been a constitutional violation or other legal irregularity.⁴⁵ At trial, few defendants testify to their version of events. Further, defense lawyers can develop a case theory at any of these stages based on the police report and other prosecutorial evidence, largely without the input of the defendant.⁴⁶ This is not true of sentencing hearings.

At a criminal sentencing, the client himself will be able to discuss what he perceives to be relevant about himself and the case during his presentence interview and, in court, during allocution. Most courts will require that a presentence investigation report be prepared before sentencing,⁴⁷ and require that it include the probation officer's understanding of the client's version of the case.⁴⁸ The report will be presented to the sentencing court. At the sentencing hearing itself, after the lawyer's presentation of evidence or argument, the defendant has the right to make a statement on his own behalf in allocution.⁴⁹ A lawyer's argument on his behalf does not substitute for this

⁴⁵ Many have emphasized the importance of an approach to the entire case that involves the client in decision-making throughout the case, whether termed client-centered advocacy or given another name. BINDER ET AL., *supra* note 24; Dinerstein, *Client-Centered Counseling*, *supra* note 18; Kruse, *supra* note 24.

⁴⁶ I am not suggesting that this is desirable practice; only that in cases that are largely defensive, or where there will be no evidence presented by the defense, defense lawyers can (and do) develop case theories largely without significant participation from their clients.

⁴⁷ See, e.g., FED. R. CRIM. P. 32 (c) (requiring presentence investigation except in limited circumstances, in federal court).

⁴⁸ Attorneys may, in appropriate circumstances, advise their clients not to discuss the facts of the case in preparation for presentence interviews. See, e.g., Leslie A. Cory, Comment, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L. J. 379, 426-27 (discussing fact that attorneys may advise clients not to make a statement and analyzing the effect of defendant's statements to probation officers). For example, these situations include where the client's version may expose him to additional criminal liability or where the client's version is sharply distinct from the theory presented at trial.

The version of facts in the presentence report is the probation officer's interpretation of the client's story, as distinct from the direct voice of the client. Probation officers hear the defendant's story through whatever filter and preconceptions that they have about the charge or the offense. Further, they will include their own subjective assessment of the client and, often, his or her own credibility. These interpretations can and do make their way into what is asserted to be simply the defendant's version of what took place.

⁴⁹ This right is based on statutory authority, see, e.g., FED. R. CRIM. P. 32(i)(4)(A); ME.

right; the right is personal to the defendant.⁵⁰ Despite the complete absence of the defendant's account of the case and himself through most of the case, at sentencing, the defendant's version will be heard. This is almost always true even if the defendant does not choose to speak at the sentencing hearing itself, because he has spoken to a probation officer for the preparation of the presentence report.⁵¹

The stories that defendants tell about themselves at sentencing are not always the stories of contrition, or even mitigation, that judges want to hear. Some defendants, even if they have pleaded guilty, will often want to contest elements of the offense, facts that were alleged in the police report, or facts alleged in the probation report. Some may want to emphasize their motivation or instigation for committing an offense, even if it is not legally relevant or will not mitigate their sentence. In addition, as allocution usually comes after argument by defense counsel and the prosecution, some defendants are tempted to respond defensively to an account of themselves presented by the prosecutor, instead of offering an affirmative account of their own. Finally, among other stories that defendants tell about themselves at sentencing, defendants may want to offer a story of complete innocence, even after conviction at trial. These stories are not necessarily consistent with the remorseful and penitent defendant that is expected at criminal sentencing.⁵² They also may not be consistent with what the attorney believes to be the most effective argument at sentencing. Yet, they will still be heard.

R. CRIM. P. 32; MD. R. 4-342(f), and may be a federal constitutional right based in the Due Process Clause, *see* *McGautha v. California*, 402 U.S. 183, 218 & n.22 (1971), *vacated sub nom.*, *Crampton v. Ohio*, 408 U.S. 941 (1972) (noting that the U.S. Supreme Court has not addressed whether a judge's refusal to allow a defendant to allocute is a Due Process violation). Federal circuit courts are split on the question. *Compare* *Boardman v. Estelle*, 957 F.2d 1523, 1525–26 (9th Cir. 1992) (constitutional right), *United States v. Jackson*, 923 F.2d 1494 (11th Cir. 1991) (same), *United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991) (same), *and Ashe v. North Carolina*, 586 F.2d 334, 335–36 (4th Cir. 1978) (same), *with United States v. Li*, 115 F.3d 125, 132–33 (2d Cir. 1997) (no constitutional right), *United States v. Coffey*, 871 F.2d 39, 40 (6th Cir. 1989) (same), *and United States v. Prince*, 868 F.2d 1379, 1396 (5th Cir. 1989) (no constitutional right when defendant did not request allocution). Some state courts have also interpreted their state constitutions to provide for the right of allocution. *See State v. Chow*, 883 P.2d 663, 668–69 (Haw. Ct. App. 1994) (citing *Schutter v. Soong*, 873 P.2d 66, 87 (Haw. 1994)); *State v. Rogers*, 4 P.3d 1261 (Or. 2000); *Harvey v. State*, 835 P.2d 1074, 1081–82 (Wyo. 1992) (citing *Christy v. State*, 731 P.2d 1204, 1207 (Wyo. 1987)).

⁵⁰ *Green v. United States*, 365 U.S. 301, 304 (1961); *Boardman v. Estelle*, 957 F.2d 1523, 1525–26 (9th Cir. 1992) (“the right of the defendant to personally address the court . . . is an essential element of criminal defense”).

⁵¹ Even if the defendant chooses – or is advised – not to talk about the offense with the probation officer, he will almost inevitably give some account of himself as a person.

⁵² Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 98 (2004) (“apology and remorse factor in most significantly at sentencing”).

This feature of sentencing hearings means that a new attorney, developing a case theory for sentencing, will have to, at a minimum, be aware of the client's theory of his own case. Imagine a lawyer who develops a sentencing plan that focuses on the mitigating fact that the client's mental illness was a significant factor in his criminal behavior, and that the client's sentence should be reduced as a result. The lawyer could develop effective sentencing advocacy around this fact, including the testimony of relatives or doctors, records of treatment or evaluations, or letters from counselors. These diligent efforts could backfire – or at least have to be reconsidered – if the client's view of the case is that he was justified in his behavior. The client's different perspective of the events may have a very different effect on the sentencing judge. Further, the defendant's possible denial or minimization of a mental illness may, independently, undermine the effectiveness of the lawyer's presentation.⁵³

This almost guaranteed open airing of both the lawyer's and the client's theories increases the possibility that differences between the two will come to light. This reality counsels the new lawyer to recognize the multiplicity of available case theories and to plan for the possibility that the client's perspective on the case may differ from her own.⁵⁴

This fact counsels a thorough investigation of the client's perspective.⁵⁵ How does the client's case theory take account of the facts presented? How does it differently or similarly account for facts that are damaging to the client's case? Further, can the lawyer discover the basis for the client's theory? Often, the client's theory will be based in his strongly-held beliefs about the validity of his actions or the strength of his claims. However, the client's version might also stem from a belief about how the judicial system works or some other

⁵³ The example of a mental illness is not a perfect fit here as perhaps a court, convinced of a client's mental illness, will discount the client's version *because of* the effectiveness of the lawyer's sentencing advocacy. This possibility does not solve the client advocacy problem, however; it merely shifts it. In this account, the lawyer has actually presented a sentencing theory that serves to explicitly undermine the voice and legitimacy of the defendant. While this may be a choice that a lawyer makes, it should be one made with an understanding of this dynamic and the effect on the client's autonomy.

⁵⁴ See, e.g., White, *supra* note 25 (describing a hearing in which the client did not embrace the case theory propounded by the lawyer and the results).

⁵⁵ Ideally, this recognition would begin with the initial interview and would develop from there. Unfortunately, all too often, new and inexperienced lawyers who have not taken the time to understand the client's version of his case or to discuss the case theory are surprised by the version presented by the client in the presentence investigation report. These attorneys must, at the last minute, try to bridge the gap between their representations and the client's differing representations. Further, if the client's case theory is guided not by a strongly held belief in the theory, but by a misguided understanding of what will assist his case, the lawyer has largely lost her opportunity to correct this misunderstanding.

factor of which the attorney is not aware.

More than merely being aware, the new attorney will likely have to counsel the client about his theory of the case and carefully counsel the client about the meaning of the sentencing. While the professional norms suggest that the attorney's theory of the case and the client should be developed with the client's input or, at a minimum, assent, this guiding principle isn't always helpful when there is conflict. This inevitable testing of case theory *requires* students to negotiate with their clients over meaning and case theory. While it is often the case that the attorney can present a case theory outside of the earshot of the client or can present the case without opposition from the client, at sentencing the attorney cannot ignore the client and his case theory.

The potential for conflict is reduced, but not eliminated, if the client chooses not to allocute at his sentencing hearing. As mentioned earlier, the client will most likely have presented an account of himself and the case to be included in the presentence report, so the attorney will still need to grapple with the client's version of events and how those are translated by the probation officer. Also, for a client to make an informed decision whether to testify, the attorney should discuss the sentencing hearing with the client.⁵⁶ Part of that discussion with the client should include gaining an understanding of the client's goals for sentencing and an indication from the attorney how she intends to advance those goals. Therefore, while the student-attorney may not be faced with the in-court allocution of the client, she will still have to do all of the heavy-lifting of developing a case theory for sentencing that is consistent with the client's wishes.

B. Client Autonomy And Decisionmaking In Developing Case Theory

Sometimes client autonomy can be costly, literally. Most significantly it costs the client additional fines and additional periods of incarceration. An attorney is remiss if she encourages this client self-definition without giving the client an understanding of these costs. As many have noted, lawyering with the client at the center does not require unquestioning agreement with the client; it requires fidelity to the client and understanding of his goals.⁵⁷ If the client persists with a

⁵⁶ This counseling, and ultimate decision making authority can be compared, to the client's decision whether or not to testify at trial. *Cf.* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, STANDARD 4-5.2 (1993) (listing decision to testify as a decision for the client, after full consultation with his attorney); MODEL RULES OF PROF'L CONDUCT R. 1.2 (2007).

⁵⁷ See e.g. Dinerstein, *Client-Centered Counseling*, *supra* note 18, at 593 ("The pros and cons of litigation and settlement, as well as other alternatives that the lawyer is likely to see, must enter into the client's decisionmaking calculus. What ultimately is called for is a

case theory that the lawyer believes will be damaging, the client needs to understand these costs. With that understanding secure, the lawyer must make a delicate decision between supporting the client's version and watching the client receive an additional penalty, and trying to foist her own view on the client to save the client from additional punishment, at the potential cost of undermining the client's autonomy.⁵⁸ This tug of war – between acting as a bulwark against the state on behalf of a potentially vulnerable client and supporting a client's wishes and autonomy – is all too common in a busy poverty law practice.

A number of clinicians and scholars have addressed this ethical and professional tension in other contexts.⁵⁹ For example, Rod Uphoff discusses this dilemma in the context of the decision to call a witness – arguably a more “strategic” and, therefore, attorney-centered decision.⁶⁰ He seeks to promote client autonomy to the greatest extent possible, yet allows that sometimes, it is necessary to override the client. He suggests that “lawyers locked in a strategic impasse with a defendant analyze and balance four factors—the client’s capacity for making an informed choice, the reasons for the client’s proposed choice, the degree of harm facing the client, and the likelihood of that harm occurring—before deciding how to act.”⁶¹ Uphoff’s is one of several possible approaches that can be considered by student-attorneys as they try to wade through the multiple stories available and develop a case theory for sentencing. There are no simple answers to this di-

merging of lawyer and client perspectives so that the final product, the client’s decision, is most likely to maximize the client’s satisfaction.”).

Note that while invoking “client-centered” lawyering here, I realize that the scholarly rift between those who discuss the attorney-client relationship primarily from the “client-centered” perspective and those whose perspective on the attorney-client relationship is more grounded in an understanding of the lawyer’s obligations to a particular community of clients or those who advocate a more traditional model of the lawyer-client relationship. Dinerstein, *Client-Centered Counseling*, *supra* note 18, at 506 (giving an overview of the traditional model); Kruse, *supra* note 24, at 395 (“Unlike the client-centered approach, which views client objectives as fairly static, critical lawyering theory incorporates postmodern insights about the fluid and unformed nature of the client’s objectives, emphasizing that lawyers can have either disabling or empowering effects in helping to shape client narratives and understandings of the world.”); Ascanio Piomelli, *Appreciating Collaborative Learning*, 6 CLINICAL L. REV. 427 (2000).

⁵⁸ See Uphoff, *supra* note 19, at 834 (discussing this dilemma).

⁵⁹ For examples within the criminal or juvenile justice system, see, e.g., Josephine Ross, *Autonomy Versus a Client’s Best Interest: The Defense Lawyer’s Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005); see also William Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991).

⁶⁰ See Uphoff, *supra* note 19.

⁶¹ *Id.* at 799.

lemma, and inevitably the “right” approach will vary from client to client; but these rich problems can be tackled in the context of a clinical program with the luxury of time for reflection.⁶²

In other words, confronting case theory at sentencing brings into high relief some of the ethical issues presented at a sentencing hearing and, more broadly, in the representation of criminal defendants. As noted above, developing a case theory for sentencing highlights the questions of who is the ultimate decisionmaker at any given point in a case. It also forces the attorney to face the related question of how to define what is “best” for the client.⁶³

For example, what if the attorney has a reason to believe that the client has a substance abuse problem, yet the client does not want to engage in treatment as part of a sentence?⁶⁴ Or, what if the client will gladly agree to court-ordered treatment as a sentencing condition, yet the attorney believes, again with some basis, that the client will not succeed? These questions pervade criminal defense, and other poverty law practice. In the criminal defense context, this dilemma has been most frequently recently discussed in the context of “problem-solving,” “treatment” or other “alternative” courts.⁶⁵ For example, Tamar Meekins notes the significant conflict between a client-centered advocacy model and a “best interests” model advocated by

⁶² Cf. Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 KAN. L. REV. 1, 29 (“Unquestionably, a client-centered approach to lawyering takes more time than a lawyer-centered approach.”).

⁶³ Cait Clarke and James Neuhard, “From Day One”: *Who’s in Control As Problem Solving and Client-Centered Sentencing Take Center Stage*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 19 (2002). Clarke and Neuhard identify a few of the issues that arise at sentencing in problem-solving courts as: “How do defenders define what is best for their clients? Do they try to ‘mend’ their clients? How do they work with judges, probation officers, and prosecutors? At the critical decision point, who calls the shots - the client, the judge, or the defense attorney?”

⁶⁴ See Tamar Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 118 (2007) (“For example, in a case arising in a traditional court, even where it is clear to the defender that a defendant needs some form of treatment, if the client would rather take jail time or a sanction in lieu of treatment the defense lawyer must argue against that treatment program. Defendants, like others, may not always desire what is in their so-called best interests.”).

⁶⁵ See, e.g., Meekins, *Risky Business*, *supra* note 64; Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006); Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000/2001); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. Q. 205 (1998). While these articles, and others like them, do not explicitly state that they are focused on sentencing, the nature of these courts, in which clients are often required to plea guilty in exchange for the treatment or other benefit, means that many of the significant ethical issues raised relate to sentencing advocacy.

many treatment courts, in which defense attorneys are expected to “focus on the treatment, punishment, or services they deem clinically appropriate and in the defendant’s best interest.”⁶⁶ Meekins and others criticize the pursuit of the client’s “best interests,” from the attorney’s perspective because it undermines the attorney’s role as zealous advocate for her client and undermines of her client’s autonomy and authority to make important decisions in his own best interest.⁶⁷ In preparation for sentencing, the student-attorney will likely have her own opinion about the “best” approach and sentence for the client. By developing a case theory together with the client, the student-attorney will likely be forced to confront this dilemma head on. Clinical teachers can use the development of case theory at sentencing to confront this, and related, ethical tensions.

C. *Developing A Coherent Consistent Case Theory*

Focusing on case theory in the context of sentencing hearings also serves to teach, directly or indirectly, that case theory is broader than trial theory and helps students learn to develop a coherent, consistent case theory. As mentioned earlier, much of the scholarship on case theory focuses on its relevance as a trial skill.⁶⁸ Despite the fact that many scholars recognize that case theory is multifaceted and context-specific,⁶⁹ their examples generally gravitate towards trial theory,⁷⁰ or occasionally, pre-trial proceedings and negotiations. By explicitly focusing on “case theory” in the context of sentencing practice, students learn directly—in the best tradition of clinical education—that “case theory” does not just mean “trial theory.” Grappling with case theory in the context of sentencing hearings forces this issue in a useful way.⁷¹ Like other transferable lessons, students will take the lesson from this context and apply it more generally and be open to changes in case theory in different contexts or as new information is gathered.

The multiplicity of voices heard at the sentencing hearing also emphasizes the need to consider the other perspectives available when developing a coherent case theory. In addition to being confronted with the client’s own version of the case at sentencing, the defense attorney is also presented with a number of other versions of the

⁶⁶ Meekins, *Risky Business*, *supra* note 64 at 80, n.18; *see also id.* at 117-118.

⁶⁷ *See id.*

⁶⁸ *See supra* notes 7-8 and accompanying text.

⁶⁹ *See, e.g.,* Shalleck, *Clinical Contexts*, *supra* note 41 (discussing the importance of context to case theory).

⁷⁰ *See, e.g.,* Robert Dinerstein, *A Mediation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 973-77 (1992) (discussing case theory of a trial); Cunningham, *supra* note 21 (discussing case theory of a trial).

⁷¹ *See, e.g.,* Miller, *Teaching Case Theory*, *supra* note 5; *see also supra* Part I.A.

events giving rise to the prosecution. While these may or may not be carefully formulated into a concise case theory, these potentially contrasting versions require the attorney to more carefully craft her case theory and test it against other possible options.

Sentencing hearings are not as constrained by the careful presentation of evidence that characterizes a trial. In fact, they often seem like free-for-alls. The presentence report includes the probation officer's version of events, usually taken from the police report or other discovery. The prosecutor will often be present to argue her position, usually in aggravation of sentencing, and her "case theory" will likely place the defendant in an unfavorable light. Further, the victim of the offense will be given the opportunity to present his own "case theory."⁷² This testimony is not constrained by evidentiary rules and most judges will be reluctant to cut short a victim's testimony, even if he has strayed far from his relevant contribution on the impact of the offense.⁷³ This possible cacophony of voices adds an additional challenge to the lawyer attempting to present her client in a coherent way.

Finally, sentencing hearings necessarily cause student-attorneys to begin to see the interrelatedness of their actions at different stages of the representation. Student-attorney choices at the pretrial stage affect the options available at sentencing, and vice versa. As a provocative example, Professor Margaret Etienne has suggested that the zealous advocacy of counsel up to and during sentencing may be interpreted by the trial court as a client's lack of remorse.⁷⁴ Whether this

⁷² The victim's version of what occurred can be presented in the presentence report and, in almost all jurisdictions, the victim is entitled to present oral testimony at the sentencing hearing. Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 60 n.117 (2001) (listing statutes requiring live victim impact testimony); Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003) (listing state statutory and constitutional provisions regarding victim sentencing testimony); see also Federal Crime Victims' Rights Act, 18 U.S.C. § 3771 (2000).

⁷³ Regarding the scope of victim impact testimony:

Victim impact statements are presented to jurors, judges, or parole officers. They generally concern the impact of the defendant's crime on the victim (i.e., primary victim) or, in the case of a capital crime, the victim's surviving relatives (i.e., related victim). Although the particulars of VIS may vary from one jurisdiction to another, they typically contain information that (a) identifies the offender, (b) indicates financial losses suffered by the victim, (c) lists physical injuries suffered by the victim including seriousness and permanence, (d) describes changes to the victim's personal welfare or familial relationships, (e) identifies requests for psychological services initiated by the victim or the victim's surviving family, and (f) contains other information related to the impact of the offense on the victim or the victim's family.

Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements*, 10 PSYCHOL. PUB. POL'Y & L. 492, 492 (2004) (citing *Booth v. Maryland*, 482 U.S. 496, 498-99 (1987)).

⁷⁴ Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103 (2003) (arguing that in

is true or not, choices made earlier in the representation will affect the availability and plausibility of case theories at sentencing.

In sum, the presence of a sentencing hearing towards the end of the case requires attorneys to develop a case theory that encompasses their prior representation in the case thus far, the other voices and stories presented over the course of the case, and to perceive case theory as a practice that extends beyond the trial.

D. Case Theory And Sentencing: Practical Considerations

Sentencing hearings happen *a lot*. It is the nature of criminal practice. While teaching students to develop and present case theories for trials and suppression hearings is important, many students will not have the experience of putting case theory into action in these contexts. Criminal cases, in practice, seldom go to trial.⁷⁵ Even if law school clinics take more criminal cases to trial than other lawyers, or litigate more pretrial motions,⁷⁶ a large percentage of cases still end in plea bargains.

Another, obvious, practical reason why focusing on case theory at sentencing is valuable is that sentencings are critical. Like dispositive pretrial motions or trials, sentencing hearings have significant consequences for clients. While some jurisdictions use rigid guidelines systems, nearly all sentencing structures allow for some discretion.⁷⁷ Discretion creates room for advocacy. Further, the sentencing and the record created at the hearing not only affects the client at that moment of sentence but also becomes an ongoing part of the court record and may affect future decisions made at probation and parole

the context of the federal sentencing guidelines, judges may deny acceptance of responsibility if the attorney is a zealous advocate and that, by doing so, judges can in effect, regulate attorney practice).

⁷⁵ See, e.g., Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties 24* (2002) (stating that, for felony defendants in the seventy-five largest counties in the country, approximately three percent of defendants were convicted after a trial and one percent of defendants were acquitted after a trial).

⁷⁶ See Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 586 (2007) ("In contrast to public defenders' offices, law school clinics have a wealth of resources and time to provide high-level services to their criminal clients. As a matter of course, such programs with their law client case loads frequently staffed with two student attorneys, are able to go the extra mile for clients."); Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOWARD L. REV. 31, 35 (1993) (noting that, unlike private practice, "students in clinics have small caseloads, engage in team representation of simple case, [and] do extensive preparation of small files").

⁷⁷ See, e.g., Frank O. Bowman III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 159 (2005) (noting that even within the relatively rigid pre-*Booker* federal sentencing guidelines, judges had "effectively unfettered discretion" to sentence within the guidelines ranges).

hearings.⁷⁸

In addition to their prevalence and significance, the relaxed evidentiary standards, typical of sentencing hearings in most jurisdictions, also make them a good clinical opportunity. While it is important for students to be able to identify possible theories of the case based solely on evidence that is admissible at trial, evidentiary constraints can limit the theories of the case that students may develop and present at that stage.⁷⁹ First, their discomfort with the application of the rules of evidence or uncertainty of the admission of certain evidence might keep them from contemplating a “riskier” or alternative case theory. The general lack of strict evidentiary standards at sentencing hearings, however, can free students from some of their concerns about the documents or testimony that they could use to support a particular case theory and permit them to be more creative in developing alternative theories of the case.

Students, like many lay people, may see the character of their client as an important factor in the case before being trained in what is formally relevant at a criminal trial. While this tendency presents a set of challenges for clinical teachers, such as the possibility that the student’s motivation and zeal for the case is affected by her moral judgment of the client,⁸⁰ this intuition can be useful at sentencing. The discretion exercised by the judge will be motivated largely by these same moral and ethical judgments. In other words, at least part of the stock of sentencing stories available will already be familiar to students. This, in turn, may facilitate the teaching of case theory at sentencing.

Finally, while generalizations are unfair to many diligent attorneys, it is fair to say that the standard of practice for sentencing could—and should—be higher. Sentencing is often treated as an afterthought. Defense attorneys in non-death penalty cases can and should put their energy into obtaining favorable plea bargains or winning cases at trial. Too often, sentencing is seen as a ministerial task after a disappointing loss or a plea. Lawyers may perceive “the case” to be over because there is a disposition and overlook the critical importance of sentencing practice. This results in careless mistakes in

⁷⁸ See, e.g., 61 PA. STAT. ANN. § 331.19 (West 1999) (stating that the parole board “shall . . . consider the notes of testimony of the sentencing hearing”).

⁷⁹ Alan D. Hornstein and Jerome E. Deise, *Greater Than the Sum of its Parts: Integrating Trial Evidence and Advocacy*, 7 CLINICAL L. REV. 77, 89 (2000) (discussing limits that evidentiary rules place on student development of case theory).

⁸⁰ See, e.g., Michelle S. Jacobs, *Full Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOW. L. REV. 257 (2001) (in part, discussing her students’ assessment based on poverty of the client and her attempt to determine whether students engage in value ranking).

scoring guidelines, failures to challenge vague sentencing statutes or guidelines, lack of communication with the client about the sentence and the hearing, and a failure to investigate or obtain mitigating evidence for the sentencing hearing. At the extreme, even attorneys in death penalty cases may have a sentencing practice that merely involves putting the prosecutor to his or her proofs, instead of fully developing a coherent case theory for sentencing.⁸¹ Of course, this is not true for many lawyers.⁸²

Further, this is not entirely the fault of these lawyers. Law schools give scant attention to sentencing practice, and sentencing courses are not a mainstay of most curricula.⁸³ The criminal defense bar does no better at training and educating lawyers about sentencing.⁸⁴ While focusing on the sentencing hearing can offer a vehicle for clinical professors to address case theory, it also offers them a chance to show future lawyers the importance of sentencing and to help new lawyers develop effective sentencing advocacy.

III. CONCLUDING THOUGHTS: TEACHING CASE THEORY THROUGH SENTENCING PRACTICE

Along at least a few dimensions, then, sentencing hearings, especially for the misdemeanor cases that are common in clinical programs, can present relatively simple vehicles to teach case theory.⁸⁵ The legal overlay at sentencing hearings does not generally involve the enforcement of evidentiary rules and, in many lower level of-

⁸¹ Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 356-57 (stating that, in the context of capital trials, "some attorneys devise a strategy for the guilt stage without considering the penalty phase. Others take the position that they will merely 'put the government to its burden of proof' at the penalty stage. Both approaches are inadequate. Because the penalty trial will be critical if the defendant is convicted of the capital offense, defense attorney must devise a coherent strategy for that proceeding.").

⁸² See, e.g., *United States v. Bailey*, 369 F. Supp. 2d 1090, 1093 (2005) (federal district court sentencing in which the judge notes that the defense attorney submitted a 411-page binder of materials, which the judge relied upon in departing downward, for a relatively uncommon reason, from the Sentencing Guidelines).

⁸³ For example, unlike traditional criminal law, and many related topics, there is only one significant law school casebook on sentencing. See NORA V. DEMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* (2004).

⁸⁴ Clarke & Neuhard, *supra* note 63 at 13 ("Why is it that virtually all of our legal teaching and training models use the trial as the singular icon of lawyering in the criminal justice system? The defense bar has barely explored skills development and sophisticated training programs on plea negotiations, sentencing alternatives, and training of sentencing advocates, and has not deeply mined the kaleidoscope of client needs and expectations in diversion and sentencing.").

⁸⁵ See, e.g., Miller, *Teaching Case Theory*, *supra* note 5 (suggesting that students begin with grasp-able/relatively simple situations in which to view case theory and then build upon this understanding).

fenses, will not involve a complicated sentencing law structure.⁸⁶ In addition, with the factual development for the case that has occurred prior to sentencing, new lawyers should have less difficulty “imagining”⁸⁷ the possible facts that may be presented at the hearing. Lawyers will already have had the opportunity to review the police report and other law enforcement materials, interview any fact witnesses or complainants, and interview their own client. This factual investigation can serve as a basis for understanding the possible case theories consistent with these facts. The third possible way in which sentencing hearings may reduce complexity and, therefore, present means of exploring case theory that is comprehensible to a newer attorney, is through the frequent use of stock images and stories at sentencing. Lawyers, litigants and judges often rely on a few common themes at sentencing hearings – including themes of remorse, restitution,⁸⁸ desert, and redemption.⁸⁹ Some scholars have even asserted that the simplified themes of popular culture⁹⁰ have shaped what is expected and relevant at sentencing.⁹¹ While lawyers and clients are not limited to these themes, the familiarity of these sentencing ideas can make the development of at least some case theories easier.

Although a focus on sentencing hearings allows for the simplification of some aspects of case theory, the other features of sentencing hearings discussed here provide additional challenges. These challenges, however, dovetail with a common clinical course focus on cli-

⁸⁶ This is obviously less true in felony cases, especially in jurisdictions that adhere to statutory sentencing guideline systems, some of which can be incredibly legally complex. See, e.g., Excerpt from *Principles for the Sentencing Systems: A Background Report*, 18 FED. SENT’G REP. 207, 213 (2006) (“[T]he Federal Sentencing Guidelines and associated statutory provisions are, taken together, one of the most complex sentencing regimes ever devised.”). My discussion of sentencing as a means to discuss and implement case theory has also, without being explicit, assumed that student-attorneys and new attorneys are not conducting penalty phase hearings in death penalty cases, which, I would argue, provide an urgent opportunity for case theory but involve intricate legal and factual understandings; likely one reason that these cases are not as commonly used for clinical teaching.

⁸⁷ Miller, *Teaching Case Theory*, *supra* note 5, at 296 (using this term to describe the first necessary step in case theory understanding).

⁸⁸ See Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329 (2007); Bibas & Bierschbach, *supra* note 52; Marvin E. Frankel & Gary P. Naftalis, *Sentencing: Helping Judges Do Their Jobs*, 1-SUM CRIM. JUST. 2 (1986).

⁸⁹ See 3 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 526 (2007); Frankel & Naftalis, *supra* note 88.

⁹⁰ Miller uses these simplified themes as an entrée into understanding case theory. Miller, *Teaching Case Theory*, *supra* note 5, at 309 (“Movies are an entertaining way to grab students’ attention. As an aspect of popular culture, movies are easily familiar and immediately relevant.”)

⁹¹ RICHARD SHERWIN, *WHEN LAW GOES POP* 167 (2000) (stating that it is on the basis of “popular stock images, character types and plot lines from commercial television . . . that public policies, criminal statutes, and sentencing guidelines are being drafted and passed into law”).

ent-centered lawyering⁹² and client counseling. As a result, the discussion of case theory in the context of criminal sentencing both builds upon traditional elements of clinical coursework and requires students to confront difficulties with these concepts that are easy to adopt in theory, but more demanding to implement in practice.⁹³

⁹² See generally Chavkin, *Spinning Straw Into Gold*, *supra* note 6; Kruse, *supra* note 24; Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993) [hereinafter Shalleck, *Constructions of the Client*].

⁹³ See generally Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1779 (1987) (describing theory as a “formulation that guides or governs practice from a position outside any particular conception of practice”). See also work on the theoretics of practice, including Dinerstein, *A Meditation on the Theoretics of Practice*, *supra* note 23; Stephen Ellmann, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 991 (1992); Shalleck, *Constructions of the Client*, *supra* note 92, at 1748 (describing theoretics of practice as “growing body of work that attempts to unite theory and practice”).